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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS, *Petitioner,*

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S REPLY BRIEF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITIONER'S REPLY BRIEF.

It is curious that respondent reverts to a position taken by it in Enelow vs. New York Life Insurance Company (No. 47, October Term, 1934, heard by this Court on November 7th, 1934), but abandoned and not urged by it in its brief in opposition to the petition for certiorari. The contention we refer to is that it has no adequate remedy at law by pleading its defense in the lawsuit because the estate of the insured "has an interest in the insurance now in litigation." Evidently it did not advance this point in its brief in opposition to the petition for certiorari because it realized the absurdity of claiming that it must be allowed to proceed in equity because there alone it can get full relief against other outstanding interests, when it made no such claim in its affidavit of defense, or in its petition for a hearing in equity, and actually went through the trial before the chancellor without bringing in anybody else as a party. But the pressure of its necessities forced it to bring it up in its final brief, notwithstanding its first decision not to mention it.

It says on this point: "The fact that respondent mistakenly tendered the premiums to the plaintiff when we had not yet learned as much about this controversy as we now know should not, we respectfully submit, change the rules of law." It is vague about what it "had not yet learned." What *facts* did this insurance company not learn until after the case was tried before the chancellor? It insinuates, without expressly saying so, that it did not know the legal (?) proposition that the estate of Adamos had an interest in the insurance in litigation and they plead, therefore, that they should not be penalized for this claimed ignorance of

the law. They were not ignorant of such a simple proposition of insurance law. They know that the estate of Adamos does not have any interest "in the insurance now in litigation." The only one having any interest in the *insurance* is the beneficiary. It is a mere sham to contend that both the beneficiary and the insured's executors have an interest in this policy. The "insurance" is payable to the beneficiary, if the policy is valid. It is payable to nobody, if it is invalid. And as regard the premiums, it is a humiliating confession for an insurance company to make that, until the year 1934, they did not know that the estate of an insured was interested in the policy or the insurance in litigation. For probably over a hundred years insurance companies have been tendering refunds of premiums to the beneficiaries, in cases where they contested suits on policies on the ground that they were obtained by false answers. They evidently were never hurt by that procedure, or we would not find them, in the year 1934, continuing that time-honored practice. They have not pointed to a single case where the estate of an insured brought a suit to recover on a policy which was payable to a beneficiary who had brought suit on it and was defeated by a defense such as is here involved. It is plain that it is not the fact that anyone else has an interest in the policy besides the beneficiary but their necessities to find some pretext for claiming they need equitable relief, that is responsible for this belated and untenable position. It is, obviously, not presented in good faith, in view of the present state of the record which shows that respondent *entered judgment to petitioner* for the amount of the printing. (R. A. T.)

Our brief, on page 7, refers to the very late case of Harnischfeger Sales Corporation vs. National Life Ins.

Co., 72 F. (2d) 921, (C. C. A. 7). The matter contained in our brief above the citation of the case is the principle stated in the first syllabus. Through an error the matter is enclosed in quotation marks. In that case, a bill in equity was filed *prior* to the lawsuit. Although this case was decided since sec. 274(b) of the Judicial Code was put on the statute books, it affirms the principle that a court of equity should not order cancellation of an insurance policy procured by fraud where the facts indicate that the fraud could be used as a defense to an action at law on the policy, and cites the cases of Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, Cable vs. U. S. Life Ins. Co., 191 U. S. 288; Boyce's Extrs. vs. Grundy, 3 Pet. 210; and Sec. 724 of the Revised Statutes (28 USCA sec. 384).

Respondent's other reason for claiming that it has no adequate remedy at law is the alleged difference in the degree of proof required to establish fraud in a court of law and in a court of equity. The unsoundness of this contention has been pointed out by us in our brief. We do wish to call attention, however, to several statements which respondent makes in trying to build up its argument. It says (p. 21): "At law the mere falsity and materiality of the representations would not constitute a sufficient basis for relief. Knowledge by the applicant of the falsity of his answers when he made them would be a requisite additional element." Such a statement is strange, to say the least. If A makes a false representation on a material matter in making a sale to B, or procuring a contract from B, can there be any doubt that B could successfully defend a lawsuit brought by A to recover on the sale or on the contract? Later on in its brief we find what is

probably respondent's reason for making such an extraordinary statement, and it is this, that the Uniform Sales Act (adopted in Pennsylvania in 1915, P. L. 543) Sec. 12, provides that "any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon." That a statute terms a statement of that character a warranty does not detract from the fact that in common as well as legal parlance such a statement is also known as a representation. And for breach of it, relief may be obtained in a court of law as well as in a court of equity.

"How a *judge* may sit as a chancellor at a jury trial in the Pennsylvania state courts is shown by Hile's Estate, 310 Pa. 541, 545, and the cases there cited," says respondent (15). Presumably this is an answer to what we said in our brief, page 13, when we were discussing the opinion of the Circuit Court in the case of Enelow vs. New York Life Insurance Co., *supra*. We were there calling attention to the strange remark of the court that if this case had been permitted to remain in the Pennsylvania court, it would be tried by the trial court with the assistance of a jury "as if the Court *and* Jury were sitting as a Chancellor" (Italics ours). Respondent has not pointed to any case in Pennsylvania where a court *and* jury sat as a chancellor. The Hile case, *supra*, was a case involving an issue *devisavit vel non* in which, under the Pennsylvania Orphans Court Act of 1917 (P. L. 363), the judge,—not the judge and jury,—sits as a chancellor.

In our brief we pointed to the facts that by the terms of respondent's own contract it was bound to prove

knowledge, by the assured, of the falsity of the answers, and that respondent realized its burden and pleaded such knowledge in the affidavit of defense. In its brief (19), it attempts to answer us by saying that we overlook the fact that the affidavit of defense had to cover the respondent's defense at law as well as in equity and that as stated by the court in the Marotta case, *supra*, the defense was both legal and equitable. As regards the latter point, we do not intend to reargue that because that really involves the whole case, and if this Court was correct in the Bailey and Cable cases, *supra*, the Circuit Court was wrong in the Marotta case in saying that the defense was equitable. However, what respondent has to say on the point seems to amount to this that when they are in a court of law litigating with the petitioner, they have to make one defense and when they are in a Court of Equity they have to make another defense. It would seem as though the facts are not the important things, but the technicalities are.

The case of the respondent seems to have developed in this fashion: Suit was brought against it in a court of law, by the beneficiary, on the policy. It filed an affidavit of defense setting up what it, under the provisions of its own contract, must set up to succeed, viz: that the assured knowingly and fraudulently made false answers to the application. It then endeavors to misuse the statute (sec. 274(b) of the Judicial Code) to deprive the plaintiff of the right to a trial by jury, and bases its attempt on the claim that fraud is an equitable defense, and, of itself, gives equity jurisdiction. The Bailey, Cable and many other cases are then called to its attention. Finding that its claim that fraud is an equitable defense is disproved by the

above cases, it says it has another ground for claiming that it has no adequate remedy at law, namely, that in equity it can get along and succeed if it proves only the falsity of the answers without proving the applicant's knowledge of the falsity. Shown its own affidavit of defense, in which it charges that the assured had knowledge of the falsity of the answers, it says that it made that charge because it had to under the rules governing pleadings in actions at law. But that has already been shown to be incorrect. Its peculiarly worded contract put upon it the duty of proving that incorrect answers were knowingly made, or it is senseless.

Respectfully submitted,

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